STATE OF MICHIGAN

COURT OF APPEALS

TAMI H. DEVEROUX,

Plaintiff-Appellant,

v

LAWRENCE N. TUCKER, LAKE SHORE PUBLIC SCHOOLS, MARTHA KLEIBERT, and RHODA ESLER a/k/a RHONDA ESLER,

Defendants-Appellees,

and

CITY OF ST. CLAIR SHORES, ST. CLAIR SHORES POLICE DEPARTMENT, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, CITY OF GROSSE POINTE FARMS, GROSSE POINTE FARMS DEPARTMENT OF PUBLIC SAFETY, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, DETECTIVE D. SPENS, OFFICER WILLIAM PORTER, OFFICER MATTHEW STEPPEY, BADGE 44 MICHAEL BUCKLEY, BADGE 52 MATTHEW HURNER, and BADGE 48 OFFICER FRANK ZELINSKI,

Defendants.

UNPUBLISHED
February 13, 2014

No. 310592
Macomb Circuit Court
LC No. 2010-004837-CZ

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

In the course of a long, contentious custody battle, plaintiff Tami H. Deveroux filed a separate civil suit against the father of her child, Lawrence N. Tucker, for allegedly engaging in an ongoing course of action to harass her and interfere with her parental rights. Plaintiff dragged the child's elementary school principal, Martha Kliebert, and school district into the fray and even raised claims against the court clerk, Rhonda Esler, employed by the circuit court judge handling the underlying custody proceeding. The circuit court correctly determined that Kliebert, Lake Shore Public Schools and Esler were protected by governmental and quasi-

judicial immunity and discerned no question of material fact supporting plaintiff's claims against Tucker. Moreover, the circuit court properly denied plaintiff's unfounded motion to disqualify the entire Macomb circuit court bench from hearing her case. We affirm.

I. JUDICIAL DISQUALIFICATION

Plaintiff sought to disqualify the entire Macomb circuit court bench because defendant Esler was a court employee and plaintiff challenged actions taken by Esler in fulfilling her role as a court clerk. Given the close working relationship between a trial judge and his clerk and the likely relationships Esler had with other court employees, plaintiff contended that there existed an unreasonable risk of bias on the part of any Macomb circuit court judge.

Plaintiff filed her disqualification motion 21 days late and failed to establish good cause to circumvent the filing deadline requirement. See MCR 2.003(D)(1). Plaintiff also failed to comply with MCR 2.003(D)(2)'s requirement that an affidavit accompany all motions for judicial disqualification. Accordingly, the circuit court could have denied plaintiff's motion on purely procedural grounds.

The circuit court instead properly denied plaintiff's motion on the merits. MCR 2.003(C)(1)(b) permits judicial disqualification in the absence of evidence of actual bias as follows:

> The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

As stated in *Caperton*, 556 US at 872, "there are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (Quotation marks and citation omitted.) The question in such a case is "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 883-884 (quotation marks and citation omitted). As further noted by the Supreme Court, "objective standards may also require recusal whether or not actual bias exists or can be proved. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 886 (quotation marks and citation omitted). Disqualification is required when the situation "offer[s] a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* (quotation marks and citation omitted).

Our Supreme Court has required the disqualification of an entire county bench in the past. For example, in *Special Wayne Prosecutor v Recorder's Court Judges*, 409 Mich 1119 (1980), the Supreme Court ordered the disqualification of the entire recorder's court bench and the assignment of a visiting judge to hear a case in which a recorder's court judge was being criminally tried. The disqualification was required because every other recorder's court judge

was being investigated by the grand jury and could still face potential prosecution. If any of those judges heard the case and found in the charged judge's favor, "the public reasonably could have seen it as an act of 'self-protection.'" *People v Kilpatrick*, 482 Mich 946; 753NW2d 631 (2008) (Kelly, J., concurring) (discussing the *Special Wayne Prosecutor* decision).

However, there is no precedent requiring that an entire bench disqualify itself simply because the employee of one judge is a party to the action. The judge who employed Esler was not assigned to plaintiff's separate civil action, greatly reducing the risk of bias. And the individual circuit court judges tasked with deciding motions in this matter considered their own relationship with Esler before proceeding. Accordingly, we discern no merit in plaintiff's disqualification motion.

II. SUMMARY DISPOSITION OF CLAIMS AGAINST COURT CLERK ESLER

Plaintiff alleges that Esler improperly handled an ex parte order that required her child's continued enrollment in Grosse Pointe Public Schools. Specifically, plaintiff claims that she properly secured an ex parte order while Esler was out of the office, and Esler improperly and unilaterally determined that the order was invalid upon her return to work. Plaintiff takes issue with Esler's communication to principal Kliebert that the order was "forged."

Esler is protected by judicial immunity. In *Maiden v Rozwood*, 461 Mich 109, 133; 597 NW2d 817 (1999), quoting 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131, our Supreme Court noted that judicial immunity "is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.'" This Court has extended the protection of quasi-judicial immunity to Department of Human Services social workers involved in child protective proceedings and court-appointed psychologists. See *Diehl v Danuloff*, 242 Mich App 120, 133; 618 NW2d 83 (2000); *Martin v Swihart*, 215 Mich App 88, 94; 544 NW2d 651 (1996). Although this Court has not had the opportunity to consider the immunity available to court or judicial clerks in a published opinion, there is support from the Sixth Circuit Court of Appeals for this proposition. See *Huffer v Bogen*, 503 Fed Appx 455, 461 (CA 6, 2012); *Johnson v Turner*, 125 F3d 324, 333 (CA 6, 1997); *Brown v Glasser*, 869 F2d 1488 (CA 6, 1989). See also *Oliva v Heller*, 839 F2d 37, 40 (CA 2, 1988).

The circuit court misspoke in its written order when proclaiming "a question of fact would exist with respect to whether defendant Esler was acting or reasonably believed she was acting within the scope of her authority." Given the circuit court's other conclusions within its opinion, it clearly found no such question of fact. We similarly find no ground to hold Esler liable for her actions undertaken in her role as a clerk for a circuit court judge.

III. SUMMARY DISPOSITION OF CLAIMS AGAINST KLIEBERT AND LAKE SHORE

Plaintiff challenges Kliebert's alleged interference with her relationship with her child, refusal to remove the child from school when presented with plaintiff's improperly obtained ex parte order, and communication to plaintiff's counsel and a Friend of the Court referee that placed plaintiff in a negative light. Plaintiff's claims against Lake Shore were for vicarious liability. These defendants enjoyed immunity for their actions as well.

MCL 691.1407 provides governmental immunity, in relevant part, as follows:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
>
> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
>
> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

Lake Shore is a governmental agency. The conduct challenged by plaintiff pertains to the management of its school district—"a governmental function." Accordingly, the circuit court correctly determined as a matter of law that Lake Shore was immune from tort liability.

Kliebert is a "lower-ranking governmental employee or official" and plaintiff pleaded claims of intentional, rather than negligent, torts against her. According to *Odom v Wayne Co,* 482 Mich 459, 480; 760 NW2d 217 (2008), we must therefore engage in the following analysis:

> If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:
>
> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

The school defendants provided extensive documentary evidence in support of the school policies promoted by Kliebert's actions. They also provided documentation and evidence regarding plaintiff's volatile, hostile, bizarre and concerning behavior on school grounds and at school functions. Plaintiff did not rebut this evidence supporting that Kliebert was acting within the scope of her authority and acting in good faith when she denied plaintiff access to the child during school hours and declined plaintiff's request to attend a class field trip.

Although defendants presented no written policies governing Kliebert's other actions, they clearly fell within the scope of her authority. Both plaintiff's attorney and the FOC investigator invited Kliebert's response to their communications in Kliebert's role as the school principal. Both letters addressed the child's education and plaintiff's effect on the child's school performance. Moreover, it clearly was Kliebert's duty to investigate the validity of the September 2008 court order before releasing and disenrolling a student. Given plaintiff's conduct the year prior when Tucker attempted to enroll the child's at Rodgers, plaintiff could not establish the necessary bad faith to overcome Kliebert's claim of governmental immunity.

IV. SUMMARY DISPOSITION OF CLAIMS AGAINST TUCKER

Finally, plaintiff alleges that Tucker had harassed her since their child's birth. She claims that he enlisted the help of personal friends in the Grosse Pointe and St. Clair Shores police departments in furtherance of his plans. Plaintiff also claims that Tucker enrolled their child in the Lake Shore schools in violation of court order. The circuit court correctly determined that plaintiff failed to create a genuine issue of material fact in relation to these claims and summarily dismissed them pursuant to MCR 2.116(C)(10).

First, as noted by the circuit court, any claim related to plaintiff's 2004 and 2009 arrests must fail because plaintiff cannot as a matter of law show that Tucker caused her injuries. Although Tucker instigated the arrests, both were based on probable cause. Plaintiff's 2004 arrest on charges of possessing a stolen car was resolved only when plaintiff returned her wrongfully retained rental vehicle and paid the amount due. Plaintiff pleaded nolo contendere to attempted parental kidnapping/parental interference in relation to her 2009 arrest for parental kidnapping. Accordingly, despite her current protests of innocence, plaintiff cannot establish actual innocence and the circuit court properly determined that she caused her own injuries.

In relation to Tucker's decision to enroll the child at a Lake Shore school, the evidence established as a matter of law that Tucker was permitted to take that action. Pursuant to the February 22, 2008 consent order in the custody proceeding, plaintiff could only maintain the child in the Grosse Pointe school system if she continued her residence at her rented home on Norwood Drive or purchased a home in the school district. Plaintiff was evicted from the Norwood Drive home and she did not purchase a home in Grosse Pointe thereafter. According to the plain language of the court order, Tucker did nothing amiss when he enrolled the child in his school district.

In relation to plaintiff's claim that Tucker had instigated numerous pretextual traffic stops against her, the Grosse Pointe Police Department and individual officers sued in this matter

presented evidence that plaintiff had been stopped on three occasions and had received a citation on all three citations. This is contrary to plaintiff's contention that she received a citation on only one occasion. Pursuant to MCR 2.116(G)(4), if a defendant presents evidence supporting its summary disposition motion, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Even if the circuit court had accepted plaintiff's affidavit accompanying her response to the summary disposition motions, it would not have helped her cause. Plaintiff made no averments about the traffic stops. Accordingly, based on the unrebutted evidence presented by the various defendants, plaintiff could not create a genuine issue of material fact in relation to her claims against Tucker.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Karen M. Fort Hood